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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE, PETITIONER

v.

UNITED STATES OF AMERICA

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (A. 30-31) is not eported. The court of appeals wrote no opinion. Its rder affirming the district court (A. 34) is not eported.

JURISDICTION

The judgment of the court of appeals was entered n April 21, 1972 (A. 2). The petition for a writ of ertiorari was filed on June 1, 1972, and was granted n November 6, 1972 (A. 35). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a hearing on his self-serving and uncorroborated allegations in a motion to vacate his sentence under 28 U.S.C. 2255 that he was coerced into pleading guilty, where he personally represented to the court at arraignment that his plea was not coerced and where neither the motion nor the records in the case reveal any objective facts explaining why petitioner could not have been expected to reveal the alleged coercion at the arraignment.

2. Whether, if petitioner's allegations of coercion are not barred by his responses at the arraignment, a hearing was nevertheless properly denied on the ground that his motion and the records in the case conclusively show that he is entitled to no relief.

3. Whether the conclusory assertions in the motion that petitioner lacked the mental competence to plead guilty required a hearing.

4. Whether petitioner validly waived his right to counsel; if so, whether his guilty plea was invalid because it was entered after the waiver of counsel.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * * or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.* * *

Rule 11, Fed. R. Crim. P., as amended February 28. 1966 (effective July 1, 1966), provides in pertinent part:

> * * * The court may refuse to accept a plea of guilty, and shall not accept such plea * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. * * * The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

In November 1969, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to a one-count information charging him with the armed robbery of a federally insured bank in violation of 18 U.S.C. 2113(d). He was sentenced to 20 years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (A. 8). In August 1971, petitioner filed *pro se* a motion under 28 U.S.C. 2255 to vacate his conviction and sentence on the ground that his plea had not been voluntarily and competently entered (A. 1, 9–15). The district court denied the motion without holding an evidentiary hearing (A. 30–31) and the court of appeals affirmed (A. 34). The files and record in the case, on

which the district court relied in denying the motion summarily, show the following facts:

A. THE ARRAIGNMENT PROCEEDINGS

On November 13, 1969, petitioner, then 26 years old, appeared before District Judge Fred W. Kaess for arraignment on the information (A. 3, 16). An Assistant United States Attorney told the court that petitioner had been given a copy of the information, had been advised of his rights to counsel and to grand jury indictment, had signed waivers of both rights, and had indicated that he intended to plead guilty to the information (A. 3). The court explained to petitioner his rights to indictment and to counsel; petitioner confirmed that he was waiving both rights.[1]

[1] The colloquy between the court and petitioner with respect to the waiver of rights was as follows (A. 4):

"The COURT. The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

Defendant FONTAINE. Yes.

The COURT. You have signed a waiver of that right, am I right?

Defendant FONTAINE. Yes, sir.

The COURT. In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

Defendant FONTAINE. I guess so.

The COURT. You have got to know so.

Defendant FONTAINE. Yes, sir."

The court then questioned petitioner personally to determine whether he understood that he was charged with armed bank robbery, whether he realized he was subject to a possible maximum penalty of 25 years in prison and a $10,000 fine, whether anyone had made any promise of any kind with respect to his proposed guilty plea or had threatened him, and whether he was "knowingly and freely and voluntarily" offering his plea of guilty. Petitioner acknowledged that he understood the charge and maximum penalties, stated that no threats or promises had been made, and assured the court that the was entering his plea voluntarily (A. 4–5). Petitioner specifically admitted that on October 8, 1969, he had held up at gunpoint the teller of the Liberty State Bank in Hamtramck, Michigan, had taken over $1,400, and had been aided and abetted in the robbery by one Edward Gregory Lee (A. 5–6). Petitioner thereupon asked the court to accept his plea since he "never had a past record"[2] and since he "got strung up on drugs and * * * started to make some money" (A. 6). The court accepted the plea and ordered the preparation of a presentence report (*ibid.*).

B. THE SENTENCING PROCEEDINGS

Three months later, on February 13, 1970, petitioner again appeared before Judge Kaess, this time for sentencing (A. 7–8). The court noted that petitioner had

[2] In this Court, petitioner acknowledges that his denial of a past record at the guilty plea hearing was incorrect and that in fact he has a lengthy police record, including several convictions (Pet. 11; Reply to Memorandum in Opposition, p. 4).

waived his right to counsel at the time of his plea and asked him whether he wished to proceed without counsel during sentencing as well. Petitioner said he did. Before the court imposed sentence, petitioner asked for mercy on the ground that he had been "under the influence of drugs when this happened." He further represented to the court that since he had been in jail for five months, he believed he had kicked the habit (A. 8).

C. THE SECTION 2255 PROCEEDINGS

1. THE MOTION TO VACATE

On August 6, 1971, almost 21 months after pleading guilty, petitioner filed a *pro se* motion in the district court under 28 U.S.C. 2255, seeking to vacate and set aside his judgment of conviction and sentence (A. 1, 9–15).[3] Petitioner alleged in the motion that on the night of October 21, 1969 (some two weeks after the bank robbery and 23 days prior to the entry of his guilty plea), police officers broke into his home without a search warrant or probable cause, frightened his wife and children, knocked him momentarily unconscious, dragged him in his underwear from his home, and took him to the police station. At the police station, petitioner continued in his allegations, he was handcuffed to a chair and questioned about several crimes; petitioner alleged that an officer named John Crookshank struck him with fists and open hands, called him a "nigger bastard," and promised to beat

[3] The motion was sworn to by petitioner on July 20, 1971 (A. 12).

him to death if he did not cooperate. Petitioner further alleged that "while befuddled, groggy, and in mortal fear of his life [he] informed the police that he would say anything they wanted him to say" (A. 9–10).

Petitioner also alleged in his motion that the "brutal treatment" by the police officers opened a gunshot wound he had received a few days prior to his arrest and caused the wound to bleed freely. Petitioner asserted that, after blacking out a couple of times and while in severe pain, he was refused a doctor or a lawyer and was told that his head would be bashed in if he did not cooperate. Petitioner asserted that, while allegedly in fear of his life, he agreed to cooperate, admitted committing various crimes the police told him he had committed, and signed several papers. He thereupon allegedly lost consciousness and awoke while being admitted to the Detroit General Hospital (A. 10).[4]

Petitioner further alleged in his motion that state and federal officers interrogated him in the hospital while he was "ill and mentally disturbed," and coerced him into pleading guilty to armed bank robbery in the federal court by threatening that otherwise he would be prosecuted in the state court and sentenced to life

[4] Petitioner alleged that the hospital records reflect that he was admitted suffering from "Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder" (A. 10). In fact, petitioner failed to distinguish between the hospital records relating to his admission on the day of his arrest and the records relating to a separate admission almost two months later (see pp. 9–10), *infra*).

imprisonment. The officers allegedly told petitioner the details of the bank robbery—a crime petitioner alleged he had no knowledge of committing (A. 10–11).

Finally, petitioner alleged that he had a severe mental problem, suffered from epilepsy, and had a "mental trauma of major proportions" due to having been shot in the head by the police when a teenager. His fear of the police was allegedly so strong that he lived with the constant belief that they would kill him if he did not obey their every whim. It was this traumatic condition that had led him to agree to plead guilty to a bank robbery he allegedly had not committed. Petitioner alleged that the police had so conditioned his mind for the guilty plea hearing that he did not understand the consequences of his guilty plea or of his waivers of his rights to counsel and to be proceeded against by way of indictment. He also claimed that, because he only had a seventh grade education, he did not understand the legal terms used by the court. Petitioner concluded his motion by asserting that he was mentally ill at the time of his arraignment and that his guilty plea was a product of that illness (A. 11–12).

2. THE HOSPITAL RECORDS

Petitioner attached as exhibits to his motion two discharge summaries prepared by physicians relating to separate periods during which petitioner was hospitalized in the Detroit General Hospital—the first covering the period October 21–26, 1969 (beginning the day of his arrest) and the second covering the pe-

riod from December 17, 1969, to January 6, 1970 (beginning two months after the date of the arrest and more than a month after petitioner's guilty plea) (A. 16–20).[5] Petitioner also attached to his motion a letter from a hospital in Florida relating to a two week period of hospitalization in 1962 for treatment of a gunshot wound in the head (A. 21).

The October 21–26 period of hospitalization. The discharge summary for petitioner's first period of hospitalization listed petitioner's ailments as follows: "Final Diagnosis: Hematoma, right lumbar region abdominal wall. Secondary Diagnosis: Two-week-old gunshot wound, abdominal wall" (A. 19). The summary stated that petitioner had been admitted with a history of pain and superficial swelling in the abdominal wall as a result of having been shot in the abdomen two weeks before. A physical examination of petitioner had revealed "very superficial swelling in the abdominal wall" and that the rest of petitioner's system was "absolutely normal." The summary concluded by noting that petitioner was being discharged in good condition, to be treated further in the Clinic (A. 19–20).

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[5] Because only the second of the discharge summaries was included by petitioner in the appendix to the petition for a writ of certiorari and that summary makes no reference to the first admission, we were unaware of the first admission when we filed our Memorandum in Opposition to certiorari and mistakenly stated therein that the hospital records showed that petitioner was not admitted to the hospital until December 17, 1969 (p. 2, n. 2). Petitioner clarified the matter in his Reply Memorandum (p. 2).

The December 17 to January 6 period of hospitalization. The discharge summary for this period of hospitalization listed petitioner's ailments, as finally diagnosed, as heroin addiction, serum hepatitis, old gunshot wound in the abdomen and convulsive disorder (A. 16). The summary stated that petitioner had been a known heroin addict for two years, had been in jail without access to heroin for approximately one and one-half months prior to his admission, and was admitted complaining of dark urine, vomiting and other serious discomforts which had begun approximately one week before.[6] The report also mentioned petitioner's continued complaints concerning the abdominal gunshot wound he had received two weeks prior to his arrest and referred to a previous gunshot wound he had received in the head in 1962. Petitioner reportedly had suffered from persistent headaches and "episodes of seizures" since the 1962 shooting (A. 16–17). The discharge summary indicated that petitioner had improved steadily while in the hospital after treatment for a urinary tract infection, that a neurological examination showed no neurological deficit, and that he had been discharged in satisfactory condition (A. 17–18).

The 1962 Florida hospital record. The letter from the Florida hospital discloses that petitioner[7] was

[6] In other words, the deterioration of petitioner's condition which led to his second period of hospitalization became manifest about December 10, 1969, or nearly four weeks after he had pleaded guilty to armed bank robbery.

[7] The letter refers to "Hubert Fountain, Jr.," apparently an alias used by petitioner.

admitted to the hospital in 1962, when he was about 19 years old, after being shot by the police while trying to avoid arrest. The letter reports that surgery was necessary to remove a bullet which had entered the head at the floor of the mouth and had lodged in the frontal sinus. Petitioner was "discharged as improved, with a prognosis of good" (A. 21).

3. THE DECISIONS BELOW

With the foregoing facts before it, the district court denied petitioner's motion without a hearing, holding that "[a] review of the entire record * * * fails to substantiate [petitioner's] claims" (A. 30). The court noted that the record showed that petitioner had declined the assistance of counsel prior to the acceptance of his guilty plea and that he had been questioned on the voluntariness of his plea in full compliance with Rule 11 of the Federal Rules of Criminal Procedure (A. 30–31). The court held that under these circumstances, petitioner "cannot now be heard to collaterally attack the record and deny what was said in open court" (A. 31).

On appeal, the Sixth Circuit affirmed on the ground that the district court had fully complied with Rule 11 at the guilty plea hearing (A. 34).

SUMMARY OF ARGUMENT

A

1. Petitioner's motion under 28 U.S.C. 2255 attacks the validity of his guilty plea on the ground that it was coerced. Under Section 2255, he was entitled to a hear-

ing on the allegations in his motion, "[u]nless the motion and the files and records of the case conclusively show that [he] is entitled to no relief." It is our position that where, as here, a guilty plea hearing is conducted in compliance with Rule 11 of the Federal Rules of Criminal Procedure and a defendant expressly represents in open court that his guilty plea is not the result of threats, promises, or coercion, the defendant may not ordinarily repudiate that representation through uncorroborated allegations in a Section 2255 motion that his plea was not in fact voluntary. In such situations, we submit, the motion and record "conclusively show," within the meaning of Section 2255, that the defendant is entitled to no relief.

We acknowledge that under some circumstances a defendant's representations of voluntariness at the time he pleads guilty should not be binding. If the defendant was mentally incompetent at the time of his plea or if he was specifically warned by the prosecutor not to disclose a promise of leniency to the court, he should not be foreclosed from challenging his plea in a later Section 2255 motion. But where it does not appear from allegations of objective facts in a motion to vacate or from the records in a case that the defendant could not reasonably have been expected to disclose alleged promises or threats at his guilty plea hearing, his responses at that hearing should be binding.

2. Neither petitioner's motion nor the records in this case allege or disclose objective facts explaining why he could not have been expected to disclose at the plea

hearing any alleged threats and coercion of the police some three weeks before. The subjective assertions that the police had "conditioned his mind" for the plea proceedings and that he lived in constant fear of the police totally lack the necessary specificity to free petitioner from the binding effect of his unequivocal representations to the court at the plea proceeding that he was acting voluntarily.

3. Even if petitioner is not bound by his representations to Judge Kaess at the guilty plea hearing, several factors appearing in the motion and transcripts of the plea and sentencing proceedings "conclusively show," in the aggregate, that he is entitled to no relief. First, the district court was entitled to reject petitioner's claim that he was innocent—a claim that was central to the allegation that he was coerced into pleading guilty to a crime he did not commit. Second, the medical report offered by petitioner relating to his period of hospitalization beginning on the day of his arrest does not support his allegation that the police treated him brutally on that day and caused an old gunshot wound to tear open and bleed freely. Third, the hospital records show that petitioner's claims that he was suffering from "severe illnesses" at the time of his arrest and during his initial period of hospitalization were significantly exaggerated. Fourth, the transcript of the plea proceeding belies petitioner's contention that he did not understand the terms used by the court in addressing him personally in compliance with Rule 11. Fifth, the court could properly take into ac-

count the unexplained delay of more than twenty months between the guilty plea hearing and petitioner's submission of the Section 2255 motion challenging the validity of his plea. Taken in the aggregate, these factors conclusively show that petitioner's claim of coercion was insubstantial and was properly denied without a hearing.

B

Petitioner also alleged in his motion to vacate that his guilty plea was the product of mental illness. This contention was also properly rejected without a hearing. The allegations in support of the mental illness claim were either conclusory or irrelevant, failing to specify instances of past aberrational conduct which would support the claim. Moreover, the hospital records tendered by petitioner rebutted any contention that a prior gunshot wound in the head or any of his other illnesses had rendered him mentally incompetent at the time he pleaded guilty.

C

Contrary to petitioner's contention, the record shows that he voluntarily and knowingly waived counsel at the guilty plea hearing. Furthermore, sound reasons of policy and practicality warrant rejection of petitioner's alternative argument that the Court, in deciding this case, should promulgate a rule—not required by the Constitution—forbidding the entry of guilty pleas in federal courts unless the defendant has a lawyer.

ARGUMENT

I

PETITIONER'S CLAIM THAT HIS GUILTY PLEA WAS COERCED WAS PROPERLY DENIED WITHOUT A HEARING

A. AS A GENERAL RULE, A DEFENDANT WHO PERSONALLY REPRESENTS TO THE COURT AT THE TIME HE PLEADS GUILTY THAT HE IS MAKING HIS PLEA VOLUNTARILY IS NOT LATER ENTITLED TO A HEARING ON HIS SELF-SERVING AND UNCORROBORATED ALLEGATION THAT HIS PLEA WAS, IN FACT, COERCED

1. Under 28 U.S.C. 2255, a federal prisoner may at any time file a motion in the court which imposed his sentence, seeking to vacate, set aside or correct the sentence on the grounds "that the sentence was imposed in violation of the Constitution or laws of the United States * * * or is otherwise subject to collateral attack." The statute directs the court to hold a hearing on such a motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."[8]

The right to a hearing on allegations made in a Section 2255 motion attacking the validity of a guilty plea must be considered in the light of Rule 11 of the Federal Rules of Criminal Procedure. Under that rule, a district court may not accept a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In addition, the court must be

[8] For a discussion of the legislative history of Section 2255, see *United States* v. *Hayman*, 342 U.S. 205, 210–219.

satisfied that there is a factual basis for the plea. The direct relationship between compliance with Rule 11 and resolution of a later collateral attack on the voluntariness of a guilty plea has been recognized by this Court. In *McCarthy* v. *United States*, 394 U.S. 459, 465, the Court noted that Rule 11

> * * * is intended to produce a complete record at the time the plea is entered of the factors relevant to [the] voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious dispositions of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Of particular relevance here, the Court went on to state (394 U.S. at 469–470):

> Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden* v. *United States*, [353 F. 2d 53, 55 (C.A. 9)]. The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset * * *." *Ibid.*

While we do not contend that compliance with Rule 11 automatically eliminates the need for later fact-finding proceedings in every instance, we do submit that as a general rule a defendant's explicit representation in open court that his guilty plea is not coerced by any threats or promises and is freely and voluntarily entered "conclusively shows," within the meaning of Section 2255, that the plea was

voluntary despite later uncorroborated allegations in a Section 2255 motion that the plea was not in fact voluntary.[9] The basic rationale for this position is that, except under unusual circumstances, a defendant should not be permitted by unsupported allegations to contradict the representations he personally made in open court at the time he entered his plea. See *United States* v. *Davis*, 319 F. 2d 482, 484 (C.A. 6); cf. *Lynott* v. *United States*, 360 F.2d 586, 588 (C.A. 3), certiorari denied, 386 U.S. 917.

There are, of course, circumstances under which a defendant's representations at a guilty plea hearing should not foreclose him from later attacking the voluntariness of his plea in a motion under Section 2255. The appropriate inquiry, in our view, should be whether it appears from allegations of objective facts in the Section 2255 motion or from the records in the case that the defendant could reasonably have been expected to disclose the alleged promises, threats or other impediments in response to the

[9] Most of the courts of appeals have followed this general rule. See, *e.g.*, *Pursley* v. *United States*, 391 F.2d 224 (C.A. 5); *Lynott* v. *United States*, 360 F.2d 586 (C.A. 3), certiorari denied, 386 U.S. 917; *Parker* v. *United States*, 358 F.2d 50 (C.A. 7), certiorari denied, 386 U.S. 916; *Putnam* v. *United States*, 337 F.2d 313 (C.A. 10); *United States* v. *Lester*, 328 F.2d 971 (C.A. 2); *United States* v. *Davis*, 319 F.2d 482 (C.A. 6); *Swepston* v. *United States*, 289 F.2d 166 (C.A. 8), certiorari denied, 369 U.S. 812. Other courts have required a hearing on a defendant's allegations made in a motion under Section 2255 contradicting his prior representations at arraignment. See, *e.g.*, *Walters* v. *Harris*, 460 F.2d 988, 991–993 (C.A. 4); *United States* v. *Simpson*, 436 F.2d 162 (C.A.D.C.); *United States* v. *McCarthy*, 433 F.2d 591 (C.A. 1); *Diamond* v. *United States*, 432 F.2d 35 (C.A. 9).

judge's personal inquiries under Rule 11 at the guilty plea hearing. If he could not reasonably have been expected to disclose these factors, then he should not be foreclosed from asserting them in a later collateral attack on his conviction.

The most obvious situation in which a defendant's responses at a guilty plea hearing would not "conclusively" dispose of later collateral attacks on the voluntariness of the plea would be where it later appears that the defendant may have been mentally incompetent at the time of the guilty plea hearing.[10] If he were in fact incompetent, he was legally incapable of admitting his guilt at the hearing.

Another example of a situation where a defendant would not be foreclosed from collaterally attacking his own prior representations at a guilty plea hearing might be where it is alleged in a Section 2255 motion that the guilty plea was induced by a promise of leniency made by the prosecutor who expressly or impliedly instructed the defendant not to disclose the promise to the court.[11] In such a situation, as the First Circuit observed in *United States* v. *McCarthy*, 433

[10] We show at pages 31–35, *infra*, that petitioner's allegations in his Section 2255 motion that he was mentally incompetent at the time of his plea do not require a hearing and that there is no reason to suspect he was actually incompetent at the time of his plea.

[11] See *Walters* v. *Harris*, 460 F.2d 988, 991–993 (C.A. 4); *United States* v. *McCarthy*, 433 F.2d 591 (C.A. 1); *United States* v. *Pallotta*, 433 F.2d 594 (C.A. 1); *United States* v. *Tweedy*, 419 F.2d 192, 193 (C.A. 9); see also *Reed* v. *United States*, 441 F.2d 569 (C.A. 9) (alleged promise by defense counsel); *Lopez* v. *United States*, 439 F.2d 997 (C.A. 9) (same). Cf. *Santobello* v. *New York*, 404 U.S. 257.

F. 2d 591, 593, "most defendants would be expected to deny any impropriety during the Rule 11 hearing." Or, as the Ninth Circuit noted in *United States* v. *Tweedy,* 419 F. 2d 192, 193, "a defendant might solemnly affirm to the court that his plea had not been induced by promises of leniency because he thought that this was all part of the game, and that honest answers would destroy the deal." Similarly, if a threat or promise is alleged to have been made off the record by the court itself at a guilty plea hearing, a hearing on the allegations might be necessary. Cf. *United States* v. *Simpson,* 436 F. 2d 162 (C.A.D.C.) (promise); *United States* v. *Tateo,* 214 F. Supp. 560 (S.D. N.Y.) (threat); and see *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (C.A. 2) (threat by state trial judge). For here, too, the record of the guilty plea hearing, though "undeniably of highest significance in any testing of the merit of the allegations," is—according to the allegations—"itself the product of a distortion deliberately wrought" (*United States* v. *Simpson, supra,* 436 F. 2d at 165). The above examples illustrate the type of situations in which defendants' disclaimers might properly be viewed as "evidential on the issue of voluntariness,*** not conclusive." *United States ex rel. McGrath* v. *LaVallee, supra,* 319 F. 2d at 314.

Where extenuating circumstances of the type described are not apparent on the face of a Section 2255 motion or the records of the case, however, the interests of justice are not served by permitting a defendant to disavow through self-serving and uncorrobo-

rated allegations his personal representations to the court at the time of his plea. For in such situations, the personal judicial inquiries required by Rule 11 provide the defendant with an adequate opportunity to expose possible coercive tactics used against him; his failure to take advantage of that opportunity and his explicit disclaimer of the existence of any threats or promises should foreclose later collateral attacks on the voluntariness of his plea. In the terms of Section 2255, the motion and the arraignment record in such a situation "conclusively show that the prisoner is entitled to no relief" and thus no hearing on the allegations in the motion is required.

2. In arguing that the arraignment record in this case should not be given conclusive effect, petitioner relies on this Court's decision in *Haynes* v. *Washington,* 373 U.S. 503, denying conclusive effect to expressions of voluntariness in allegedly coerced confessions (Br. 27–28). As the Court pointed out in *Haynes,* "[c]ommon sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness" (373 U.S. at 513). But the suggested analogy between a "self-contained concession of voluntariness" in an out-of-court confession claimed to have been coerced and an accused's representation to the court that no threat induced his guilty plea is false. In the confession case, the concession of voluntariness is made at the instance of the very authorities whose

allegedly coercive tactics produced the challenged confession in which the representation of voluntariness is contained. In the arraignment situation, the acknowledgement is made to the district judge, the arbiter of the plea's acceptability, in response to inquiries expressly designed to discover whether any such overreaching occurred. The proceedings are conducted, moreover, in a locale—the courtroom—removed in time and space from any coercive influences that might have affected prior proceedings.[12] In short, in most situations it is reasonable to require the defendant to answer the court's Rule 11 inquiries truthfully and to be bound by his answers.

Nor, contrary to petitioner's further assertion (Br. 21–24), does our position here conflict with this Court's decision in *Machibroda* v. *United States*, 368 U.S. 487. In that case, the defendant alleged in a Section 2255 motion that he had pleaded guilty to two informations in reliance on a promise by the prosecutor, said to have been cleared with the court, that he would not be sentenced to more than twenty years' imprisonment; the defendant was also allegedly warned by the prosecutor not to disclose the promise to his lawyer (368 U.S. at 489). Following the defendant's guilty pleas,

[12] A question not presented by this case is whether the exception to the general rule, that representations of voluntariness at plea proceedings should be conclusive, would apply where the guilty plea hearing took place within two or three days of alleged police coercion and where the coercion allegedly included an express warning to the defendant not to disclose the threats to the court. See *Smith* v. *United States*, 223 F. 2d 750 (C.A. 5).

the court had imposed consecutive sentences totaling 40 years. This Court concluded that the files and records did not conclusively show that the allegations in the Section 2255 motion were unfounded and held that a hearing was required. *Machibroda* is not controlling here for two distinct reasons. First, the trial judge in *Machibroda* had accepted the guilty pleas without questioning the defendant whether the pleas had been induced by threats or promises—indeed, the record in that case shows that no meaningful inquiries had been made of the defendant at all.[13] In other words, as the Sixth Circuit observed in *United States* v. *Davis, supra,* in distinguishing *Machibroda,* the accused had "made no representations to the Court about the nature of his plea" which he "later repudiated" in a Section 2255 motion (319 F. 2d at 485). Second, and equally important, the promise claimed to have been made in *Machibroda* was the type of promise which the defendant might reasonably have been expected not to disclose at his guilty plea hearing.[14]

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[13] See pp. 39–41 of the transcript of the arraignment proceedings in *Machibroda*, set forth in *United States* v. *Davis*, *supra*, 319 F.2d at 485, n. 1. Although petitioner asserts that Machibroda had admitted at arraignment that his pleas were voluntary (Br. 21), the transcript shows only that Machibroda answered affirmatively to the court's inquiry whether it was his "desire" to plead guilty.

[14] Petitioner discusses at length (Br. 31–36) this Court's decisions in *Brady* v. *United States*, 397 U.S. 742, *McMann* v. *Richardson*, 397 U.S. 759, and *Parker* v. *North Carolina*, 397 U.S. 790, in connection with his assertion that a hearing on allegations in a Section 2255 motion is especially appropriate where the defendant was not represented by counsel at the guilty plea

B. PETITIONER IS BOUND BY HIS IN-COURT REPRESENTATION THAT HIS GUILTY PLEA WAS NOT COERCED

The substance of petitioner's allegations in his motion to vacate is that the police coerced him into signing false written confessions to several crimes through physical mistreatment at the police station following his arrest, and induced him during his ensuing six-day confinement at the Detroit General Hospital to plead guilty to federal armed bank robbery by threatening that, if he did not so plead, he would be prosecuted in a Michigan state court and sentenced to life imprisonment (A. 9–11).[15] Yet 18 days following petitioner's discharge from the hospital and over three weeks after the alleged coercion at the police station, petitioner represented in open court in response to straightforward questions by the district court in full compliance with Rule 11 that no promises of any kind had been made to him, that no one had threatened him and that he was knowingly, freely and voluntarily pleading

hearing. In those cases, however, the issue was whether guilty pleas could be collaterally attacked as involuntary on the ground that they were prompted by possibly mistaken tactical judgments of counsel (for example, the desire to avoid the impact of a penalty scheme later found to be unconstitutional or to avoid the effect of earlier allegedly coerced confessions which might have been inadmissible at trial). In each case, this Court held that counsel's misapprehension of the legality of the penalty scheme or the admissibility of the confessions did not render the pleas involuntary where the defendants were represented by generally competent counsel. The cases have little bearing on the instant question: whether a defendant may disavow an assertion of fact made at the time of his guilty plea.

[15] Petitioner's assertion in his motion that he was mentally incompetent at the time of his plea is analyzed at pp. 31–35, *infra*.

guilty (A. 4–5). Since neither petitioner's motion nor the records in this case allege or disclose objective facts explaining why he could not have been expected to disclose the threats or coercion at the plea hearing, we submit that he is not now entitled to a hearing on his uncorroborated allegations of coercion.

Petitioner does season his allegations concerning his arrest and interrogation in the police station and hospital with some specificity. But his attempt to explain why he failed to disclose these matters at the time of the plea consists of the subjective and conclusory assertions that the police had "conditioned his mind" for the plea proceedings and that he did not understand the consequences of his waivers of counsel and indictment and of his guilty plea.[16] The latter assertions are belied by the transcript of the guilty plea hearing, which discloses specific acknowledgements by petitioner that he fully understood the nature of the proceedings and the consequences of his waivers and guilty plea.

[16] Petitioner also alleged that his constant fear of the police led him to agree to plead guilty (A. 11). While it is possible, of course, that an accused's fear of the police could be sufficiently strong to cause him to lie in open court in anticipation of what the police might do to him after the arraignment if he disclosed their coercive measures, this speculation does not warrant a hearing here since (1) the separation of time between the alleged coercion and the arraignment greatly reduces the chances that he was still acting out of fear at the arraignment, (2) the alleged mistreatment at his arrest and station-house interrogation took place at the hands of the local police whereas he would know that after his plea of guilty to a federal crime he would in all likelihood be in federal custody, and (3) the allegations of fear are generalized and apparently *pro forma*.

The assertion that the police had "conditioned his mind" is purely subjective and fails to set forth objective facts explaining why he could not have been expected to tell the truth in open court almost three weeks after the alleged coercion. There are no allegations that the police continued to coerce him while he was awaiting arraignment and no allegations that the police expressly warned him not to disclose their assertedly coercive tactics to the court. Compare *Smith* v. *United States, supra* (discussed in note 12, *supra*). In short, under all the circumstances, petitioner's representations in tendering his guilty plea foreclose him from reopening the question of the voluntariness of the plea by uncorroborated allegations.

C. EVEN IF PETITIONER IS NOT BOUND BY HIS REPRESENTATIONS AT THE PLEA HEARING, HIS SECTION 2255 MOTION AND THE RECORDS IN THIS CASE CONCLUSIVELY SHOW THAT HE IS ENTITLED TO NO RELIEF

In the event the Court disagrees with our foregoing submission that petitioner is bound by his representations to Judge Kaess at the guilty plea hearing, an examination of his motion and attachments and the transcripts of the guilty plea hearing and his sentencing "conclusively show that [he] is entitled to no relief," within the meaning of 28 U.S.C. 2255, and thus was not entitled to a hearing. While we do not maintain that any individual factor discussed below is conclusive, we do submit that, considered in the aggregate, they fully justified the denial of a hearing by the same district judge who presided over petitioner's arraignment, plea, and sentencing. *Cf. United States* v. *Thomas*, 291 F.2d 478, 481 (C.A. 6).

1. The District Court could readily conclude from the records in the case that petitioner's claim that he was innocent was unfounded

One of the central allegations in petitioner's motion to vacate is that he did not in fact commit the offense for which he was charged, but was coerced into pleading guilty after the police told him that he and another man had robbed the bank (A. 11). While a coerced guilty plea is invalid whether or not the defendant is actually guilty, petitioner's allegations of innocence and coercion are so interrelated that a showing that he was in fact guilty would seriously impugn the substantiality of his coercion claim. The records in this case conclusively rebut petitioner's claim of innocence.

When he entered his guilty plea, petitioner specifically acknowledged the details of the bank robbery (A. 5–6). While he alleged in his motion that these details were provided by the police (A. 11), he does not explain his further statement to Judge Kaess at arraignment, in apparent explanation of his crime, that "I got strung up on drugs and I started to make some money" (A. 6). In addition to his admissions at arraignment, petitioner stated three months later at his sentencing—again suggesting mitigating circumstances—"I was under the influence of drugs *when this happened*" (A. 8; emphasis added). In other words, nearly four months after the allegedly coercive conduct of the police, petitioner made a plea for mercy which contained an open admission that he had

mmitted the crime with which he was charged. Con-
stently with his approach at the time he offered his
ilty plea, petitioner sought—not to exonerate him-
lf as the victim of a police plot—but to offer ex-
ses for the crime he admittedly committed. Under
ese circumstances, petitioner's claim of innocence in
s Section 2255 motion could properly be disregarded
Judge Kaess. There is "no reason to doubt that his
lemn admission of guilt [at the guilty plea hearing]
as truthful." *Brady* v. *United States*, 397 U.S. 742, 758.

The motion and records in the case contain substantial additional indications that petitioner's claim of coercion was insubstantial

The hospital records attached to petitioner's motion
fute many of his allegations of coercion; the ar-
ignment transcript refutes others. Taken together,
ese factors give substantial support to the district
urt's summary denial of petitioner's motion.

a. Petitioner alleged in his motion that the brutal
eatment allegedly given him by the police following
s arrest had torn open a gunshot wound he had sus-
ined earlier, causing it to bleed freely (A. 10). The
spital discharge summary for the period of hospital-
ation beginning on the day of his arrest, however,
akes no reference to any recent bleeding from the
nshot wound (A. 19–20). The summary does discuss
two-week old gunshot wound in detail, but discloses
mply that petitioner was admitted with a history of

pain and with "a very superficial swelling" in his abdominal wall (A. 19).[17]

b. An integral part of petitioner's claim of coercion is that he was suffering from a number of "severe illnesses" at the time the alleged threats were made (A. 11). In support of this claim, petitioner made the assertion in his motion that the hospital records show that he was admitted to the hospital on the date of his arrest suffering from "Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder" (A. 10). In fact, however, petitioner was in the hospital twice, and this compilation of ailments combined the afflictions listed in the discharge summaries relating to both of his confinements (A. 16, 19).

References to heroin addiction, serum hepatitis and a convulsive disorder are contained only in the discharge summary relating to the period of hopitalization from December 17, 1969, to January 7, 1970, beginning over a month after his plea. The vomiting and other serious discomforts leading to that period of hospitalization had begun only a week before his admission or at least three weeks after he had pleaded guilty. While this second discharge summary does indicate that petitioner had been a known heroin addict

[17] Petitioner also alleged in his motion that he regained consciousness from the last of several blackouts suffered during the alleged police brutality as he was being admitted to the hospital (A. 10). We point out that the hospital record contains no support whatever for any suggested implication that his hospitalization might have been necessitated by the alleged police misconduct.

for two years and had been suffering headaches and seizures for seven years (A. 16), it is, of course, the first period of hospitalization, beginning on the day of petitioner's arrest, which is of major relevance to his claim of coercion. The discharge summary for the first period of hospitalization does not refer to these conditions. The summary describes petitioner's condition as "absolutely normal," apart from the superficial swelling from the gunshot wound, and states that he had been discharged in "good condition" (A. 19–20).[18]

Thus the "severe illnesses" petitioner claimed to have been suffering from at the time of his arrest and during his initial hospitalization and which allegedly led him to succumb to the alleged threats were significantly exaggerated. This fact appeared from the face of the motion and the attached exhibits and could properly have been considered by the district court in appraising the credibility of the coercion claim itself.

c. Petitioner alleged in his motion that the legal terms used by the court at the guilty plea hearing were "complete jargon" to him, "beyond his sphere of comprehension" (A. 11–12). The record shows, however, that the court in the main used such simple terms as "bank," "robbery," "armed," "gun," "held up," "teller," "promise" and "threatened" and that petitioner's answers to the questions using these terms

[18] According to the report of the later hospitalization, apart from a urinary tract infection, all other tests, including a neurological examination, were negative.

were coherent and responsive (A. 4–6). Judge Kaess, who had been in a position to appraise petitioner's understanding of the proceedings, could properly have concluded that petitioner's claim of a lack of comprehension was specious and was conclusively refuted by the record.

d. Finally, the district court was entitled to reject outright petitioner's incredible statement that, despite his alleged innocence, the police had convinced him he was a "bona fide bank robber" (A. 11).

3. The unexplained delay of more than twenty months before instituting the challenge to the plea in itself casts further doubt on the substantiality of petitioner's coercion claim

The motion to vacate was sworn to on July 20, 1971—more than 20 months after the guilty plea was entered and over 17 months after sentence was imposed (A. 3, 8, 12). No explanation for the delay was offered in the motion, with the possible exception of the conclusory and subjective references to petitioner's alleged traumatic fear of the police (A. 11). This delay in instituting the challenge to the allegedly coerced plea in itself renders the allegations in the motion suspect. Cf. *Raines* v. *United States,* 423 F. 2d 526, 531 (C.A. 4); *United States* v. *Orlando,* 327 F. 2d 185, 188–189 (C.A. 6), certiorari denied, 379 U.S. 825. This Court's decision in *Machibroda* v. *United States, supra,* does not stand for the contrary proposition that unexplained delays in seeking collateral relief should be ignored. While the motion to vacate in that case was not filed until nearly three years after the

guilty plea, the defendant attempted to explain the delay by alleging that he had written unanswered letters to the court and the Attorney General in the interim referring to his claims (368 U.S. at 490). This Court implied that the delay might indeed be significant in appraising the credibility of the substantive allegations by suggesting that the district court on remand might inquire whether the sending of such letters could be substantiated (368 U.S. at 495).

In summary, the above factors taken in the aggregate conclusively show that petitioner's claim that his plea was coerced is insubstantial and was properly denied without a hearing. Just as this Court concluded in *Parker* v. *North Carolina,* 397 U.S. 790, 796, in rejecting the claim that a guilty plea was the product of "allegedly coercive interrogation" several weeks earlier, this record reveals that "the guilty plea was * * * [petitioner's] free and voluntary act, the product of his own choice, just as he affirmed it was when the plea was entered in open court."

II

PETITIONER'S CONCLUSORY ALLEGATIONS THAT HE WAS MENTALLY INCOMPETENT AT THE TIME OF HIS GUILTY PLEA DID NOT REQUIRE A HEARING

In addition to his primary claim that his guilty plea was coerced, petitioner alleged at the end of his Section 2255 motion, almost as an afterthought, that he was "mentally ill" at the time of his arraignment and that his guilty plea was "a product" of that illness (A. 12). Petitioner also alleged that he "has a

severe mental problem and that he suffers from epi
lepsy and a mental trauma of major proportions du
to his having been shot in the head by the polic
when he was a teenager" (A. 11), although the contex
of these allegations suggests they were intended t
support the principal claim of coercion. Even if con
strued as part of petitioner's assertion of mental in
competence at the guilty plea hearing, however, th
allegations are insufficient to entitle petitioner to
hearing on that assertion, since the references to
"severe mental problem" and major "mental trauma
are wholly conclusory and since proof that petitione
was an epileptic would not, without more, establish
claim of mental incompetence.

Where a motion under Section 2255 alleges onl
"bald legal conclusions," the motion may properly b
denied without a hearing. *Sanders* v. *United State*
373 U.S. 1, 19; *Hayes* v. *United States,* 399 F. 2d 69
(C.A. 5); *Oliver* v. *United States,* 398 F. 2d 353, 35
(C.A. 9); *Hartman* v. *United States,* 310 F. 2d 44
(C.A. 6). As the Fifth Circuit held in *Hayes,* a Sec
tion 2255 motion alleging mental incompetence at th
time of plea may be summarily denied in the absenc
of assertions of "specific facts regarding the claime
prior mental history, background, or incidents o
aberration to support the conclusory allegations * * *
(399 F. 2d at 691). Contrary to petitioner's assertio
(Br. 30, n. 16), the hospital records attached to hi
motion do not satisfy the requirement of specificity

The letter from the Florida hospital describes pe
titioner's 1962 head wound which allegedly had le

to the "mental trauma" referred to in the motion. The letter indicates that the bullet causing the wound had entered the head at the floor of petitioner's mouth, had fractured his skull and several bones and had lodged in his frontal sinus. The letter does not refer to brain damage, however, and notes that petitioner had been "discharged as improved, with a prognosis of good" after only two weeks of hospital care (A. 21). The second of the two Detroit hospital discharge summaries refers to petitioner's 1962 wound and reports that he claimed to have had "persistent headache and episodes of seizures" since the incident, but does not mention any mental impairment other than the seizures (A. 16). On the contrary, that report—which petitioner annexed to his motion—stated that he had been subjected to neurological examination and that the examination "showed no neurological deficit" (A. 17).

Petitioner also states in his brief that the second discharge summary "confirms that [he] had been in jail continuously after his arrest and had been experiencing heroin withdrawal symptoms" (Br. 30). While the discharge summary does not identify petitioner's symptoms as stemming from heroin withdrawal,[19] it lists heroin addiction as one of his ailments and notes that he had not received any heroin since his arrest (A. 16). Thus, the record does indicate that petitioner might have been addicted when he pleaded guilty on

[19] The summary notes that the vomiting, dark urine, fever and other discomforts had begun about one week before petitioner's admission to the hospital on December 17, 1969. Petitioner was treated for a urinary tract infection.

November 13, 1969, even though it appears he had then been off heroin since his arrest 23 days before.[20] Petitioner does not appear to argue that his possible addiction at the time of his guilty plea in itself rendered him mentally incompetent. Nevertheless, because there has been some confusion in earlier proceedings on the relevance of his addiction,[21] we point out that a history of drug addiction, without more, does not make one incompetent to plead guilty. *Howard* v. *United States,* 420 F. 2d 478 (C.A. 5); *Lipscomb* v. *United States,* 209 F. 2d 831 (C.A. 8), certiorari denied, 347 U.S. 962; cf. *Sanders* v. *United States, supra,* 373 U.S. at 19–20. Of course, as this Court held

[20] At petitioner's sentencing on February 13, 1970, petitioner stated that he thought he had kicked the habit "already" (A. 8). He did not indicate when he had kicked the habit.

[21] Petitioner argued before the district court in response to the government's motion to dismiss his Section 2255 motion that his statement during the guilty plea hearing that "I got strung up on drugs * * *" should have warned the court that petitioner's "mental capabilities might well have been impaired causing him to incompetently waive basic rights and plead guilty * * *" (A. 27). Presumably as a result of this argument, the district court stated in its opinion denying the 2255 motion that petititoner had alleged, among other things, that his plea was the product of drug addiction (A. 30). In his petition for a writ of certiorari, petitioner again referred to his alleged drug addiction and to his statement at arraignment (Pet. 11). In our Memorandum in Opposition, we referred to petitioner's Section 2255 motion as having alleged that the plea was invalid because of (among other things) "addiction to heroin" (p. 1). In his Reply, however, petitioner disclaimed reliance on drug addiction as a factor invalidating his plea, pointing out that the Section 2255 motion had made no claim that addiction was responsible for the plea, and suggesting that the district court and we had confused the issues (pp. 2, 4). The disclaimer has not been repudiated.

in *Sanders,* a plea made by a defendant under the influence of drugs may be invalid; but petitioner has at no time suggested that he was under the influence of drugs when he entered his plea, as the prisoner in *Sanders* alleged. On the contrary, in the present case, the record affirmatively shows that petitioner had had no access to narcotics for at least several weeks prior to the entry of his plea.

Finally, petitioner's allegation that he suffered from epilepsy required no hearing because the allegation was irrelevant. "Epilepsy is not insanity and is distinguished therefrom medically and legally." *Ellis* v. *United States,* 274 F. 2d 52 (C.A. 10). Cf. *Gann* v. *Gough,* 79 F. Supp 912, 914 (N.D. Ga.), reversed on other grounds *sub nom. Hiatt* v. *Gann,* 170 F. 2d 473 (C.A. 5), certiorari denied, 337 U.S. 920. Petitioner made no allegation that his guilty plea was affected by an actual seizure during the guilty plea hearing. And, as we have discussed above, a hospital neurological examination proved negative.

III

PETITIONER VALIDLY WAIVED HIS RIGHT TO COUNSEL

Petitioner contends in his brief on the merits that the record fails to reflect that he effectively waived his right to counsel, [22] and in the alternative that, in any event, this Court should exercise its supervisory power

[22] In his Section 2255 motion, petitioner alleged he had not understood the "consequences" of his waiver of counsel (A. 11) and that the waiver "was a product of his mental illness" (A. 12). These allegations were repeated in his *pro se* petition for a writ of certiorari (Pet. 6).

over proceedings in federal courts to forbid uncounseled guilty pleas altogether or at least require a defendant to consult with an attorney before waiving counsel (Br. 47–59). In our view, these contentions should be rejected.

1. The Court has made it clear that a guilty plea to a felony charge entered without counsel is invalid, unless counsel has been waived. See *White* v. *Maryland,* 373 U.S. 59; *Arsenault* v. *Massachusetts,* 393 U.S. 5; *Brady* v. *United States, supra,* 397 U.S. at 748–749, n. 6. Under the Court's definition, waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. Whether there has been "an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Ibid.* To make an "intelligent waiver," however, a defendant need not act with any particular degree of wisdom; all that is required is that he "knows what he is doing and [that] his choice is made with eyes open." *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 279. Or, as the Court held in *Carnley* v. *Cochran,* 369 U.S. 506, 516, the record must show that the accused "was offered counsel" and "understandingly rejected the offer." Petitioner's waiver was valid under these standards.

At the time of the guilty plea hearing, petitioner was a 26-year-old man with a seventh grade education. By his own admission, he had several prior convictions (A. 11, 16; Pet. 11; Reply to Memorandum in

position, p. 4). He was informed by the district dge that he was "entitled to be represented by an torney" and that if he was "without funds with hich to employ an attorney" the court would "ap- int one" for him. The judge noted that he had fore him a "waiver of assignment of an attorney," eviously executed by petitioner, and inquired ether petitioner wished "to proceed here without attorney." When petitioner replied "I guess so," court advised him that guessing would not be ficient; he had to "know" whether he wanted to oceed without a lawyer. Petitioner then responded, es, sir" (A. 4). Petitioner suggests that his response es, sir" was ambiguous and could have been in- ded merely as an acknowledgement that he could "guess" about the waiver, rather than as an ex- cit waiver of counsel (Br. 53). In retrospect, on a d record and in isolation, petitioner's answer could argued to appear ambiguous. But the intonation at hearing evidently signaled no ambiguity or un- tainty to the district judge. And the full context of exchange demonstrates that petitioner was making leliberate waiver. Prior to the hearing, petitioner l signed a written waiver of counsel; at the hearing, was unequivocally informed of his right to counsel the district court, and he raised no objection when district court left the waiver issue to inquire ether petitioner was aware of the penalties that ld be imposed. Under these circumstances, it is ar that petitioner's response was intended as, and accepted by the district court as, a knowing waiver

of counsel." Furthermore, three months later, whe
petitioner appeared before the same district judge fo
sentencing, the judge noted that at the time of h
plea he had waived the appointment of counsel an
asked him whether it was "your wish that you proce
here through sentence without being represented b
counsel." Petitioner again responded unambiguously
"Yes, sir" (A. 8). Thus, the record in this case con
clusively shows that petitioner's guilty plea is no
subject to collateral attack on the ground of a def
ciency in waiving counsel. That waiver satisfied all o
the constitutional tests.

2. Petitioner also suggests (Br. 56) that, irrespe
tive of whether the waiver of counsel in this case wa
constitutionally valid, this Court should assert its su
pervisory powers to prohibit uncounseled guilty plea
in federal courts. This argument raises a serious con
stitutional question whether a defendant can be force
to be represented by counsel. Over 30 years ago, th
Court rejected the proposition, holding: "The right t
assistance of counsel and the correlative right to dis
pense with a lawyer's help are not legal formalisms
• • • [T]he Constitution does not force a lawyer upo
a defendant." *Adams* v. *United States ex rel. McCann*
supra, 317 U.S. at 279."

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[23] Petitioner also argues that the court erred in failing t
inform him expressly at the guilty plea hearing that he coul
repudiate his prior written waiver of counsel (Br. 52–53). How
ever, the court's inquiry "Is it your wish to proceed here with
out an attorney?" (A. 4) adequately notified petitioner tha
he was being asked then and there whether he wanted an at
torney notwithstanding the prior waiver.

[24] See also *United States* v. *Dougherty* (D.C. Cir. No. 24,31
decided June 30, 1972, rehearing denied October 26, 1972), re

Forcing a lawyer on a defendant would certainly not lay the foundation for the kind of professional relationship that should exist between a client and his lawyer. In addition, a policy that refused to permit a defendant to terminate the proceedings against him without the intervention of a lawyer would create new problems; for example, it is easy to anticipate claims by defendants convicted after a trial under such circumstances that he would have received better treatment if he had been allowed to plead guilty instead of acquiescing in the "advice" by his court-imposed counsel that he go to trial.

The alternative suggestion that a defendant be required to *confer* with a lawyer at least once before finally waiving counsel is worthy of consideration and, as petitioner points out (Br. 57), has been recommended by the American Bar Association. See *Standards Relating to Providing Defense Services*, pp. 64–65 (approved draft, 1968). The imposition of such a requirement, however, would have a substantial impact upon the administration of justice in the federal courts.[25] Whether the requirement should be adopted in the federal system requires a careful balancing of this impact against the likely utility of the rule. In our view, these considerations are essentially legisla-

versing a criminal conviction in which the trial court had insisted that the defendants be represented by counsel, and holding that a criminal defendant has a statutory right under 28 U.S.C. 1654 to waive counsel and proceed *pro se*.

[25] Petitioner cites statistics furnished by the Administrative Office of the United States Courts indicating that for the fiscal years 1969 through 1972, a total of 19,393 defendants pleaded guilty after waiving counsel. There were 104,544 guilty pleas entered during this period (Br. 56, n. 40).

tive in nature and the proposed rule should be adopted, if at all, either by statute or by an amendment to the Federal Rules of Criminal Procedure, after thorough discussion. Imposition of such a requirement—not required by the Constitution—as part of the disposition of a particular case would be inappropriate.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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